No. 05-35526
To be argued July 13, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CANADIAN CATTLEMEN'S ASSOCIATION and ALBERTA BEEF PRODUCERS,
Proposed Intervenors-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE *et al.*,
Defendants-Appellees,

and

RANCHERS CATTLEMEN ACTION LEGAL FUND
UNITED STOCKGROWERS OF AMERICA,
Plaintiff-Appellee.

Appeal From an Order of the United States District Court
for the District of Montana, No. CV-05-06-BLG-RFC

BRIEF FOR THE PROPOSED INTERVENORS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, the Canadian Cattlemen's Association and Alberta Beef Producers hereby state that neither has a parent corporation nor any publicly held corporation that owns 10 percent or more of its stock.

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STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702. This Court has jurisdiction under 28 U.S.C. § 1291 over the denial of appellants' motion to intervene. *See, e.g., United States v. Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002); *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990). On May 17, 2005, the district court denied the joint motion to intervene of the Canadian Cattlemen's Association (CCA) and Alberta Beef Producers (ABP) (collectively, CCA/ABP). Excerpts of Record (ER) 93-100. On June 2, 2005, CCA/ABP filed a timely notice of appeal under Fed. R. App. P. 4(a)(1)(A). ER 101-109.

ISSUE PRESENTED

Whether the district court erred in denying CCA/ABP's motion to intervene.

STATEMENT OF THE CASE

This appeal presents the question whether a United States district court may adjudicate a ban on imports of certain Canadian cattle and Canadian beef products into the United States without permitting the producers of Canadian cattle to participate fully in the litigation. Believing that the district court could not and should not, CCA/ABP jointly moved, pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, to intervene in the case below. That motion was denied on the grounds that CCA/ABP did not have a legally protectable interest in the litigation, that the court's determination would not impair a legally protected

interest, and that the defendant, the United States Department of Agriculture (USDA), would adequately protect whatever interest CCA/ABP might have. This timely appeal followed. CCA/ABP's motion to expedite briefing and hearing of this appeal was granted on June 14, 2005. ER 114-115. For the reasons more fully set forth below, the district court must be reversed, because it disregarded this Court's well-established standards for evaluating a motion to intervene.[1]

STATEMENT OF FACTS

A. CCA/ABP REPRESENT THE TENS OF THOUSANDS OF MEN AND WOMEN MOST AFFECTED BY R-CALF'S DEMAND FOR RELIEF.

On January 4, 2005, USDA issued a Final Rule finding that Canada was a "minimal risk" region for bovine spongiform encephalopathy (BSE). "Bovine Spongiform Encephalopathy: Minimal Risk Regions and Importation of Commodities," 70 Fed. Reg. 460 (Jan. 4, 2005) (Final Rule). The Final Rule would have allowed the importation from Canada of certain cattle and beef products, which USDA concluded to be safe, and would have taken effect on

[1] Also pending before this Court are two other appeals from orders of the district court in the suit brought by Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF): USDA's appeal from the granting of the preliminary injunction, No. 05-35264, and the National Meat Association's (NMA) appeal from the denial of its motion to intervene and appeal from the granting of the preliminary injunction, No. 05-35214. Those two appeals, together with the instant appeal, are scheduled to be heard by this Court on July 13, 2005.

March 7, 2005. *Id.* at 536, 460. Such importation had been restricted by USDA since May 2003. 68 Fed. Reg. 62,386 (Nov. 4, 2003) (2003 Rule).

The Final Rule was challenged by plaintiff R-CALF in a lawsuit filed in the U.S. District Court for the District of Montana on January 10, 2005. On March 2, 2005, the district court granted R-CALF's motion for a preliminary injunction. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agric.,* 359 F. Supp. 2d 1058 (D. Mont. 2005). Cross-motions for summary judgment are currently pending before the district court, and a hearing on the merits is scheduled for July 27, 2005.

The partial closing of the United States border to the importation of Canadian cattle and many beef products caused an estimated loss of some $4 billion to the Canadian cattle industry during just the first 18 months of the restrictions.[2] Continued closure of the U.S. border to Canadian cattle and beef has resulted in the cancellation of contracts to purchase Canadian cattle and beef made in reliance on the announced Final Rule, and it has artificially inflated the price of beef to U.S. consumers to the sole benefit of R-CALF's members.

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[2] *See Impact of 'Mad Cow' Disease on the Cattle-Beef Sector*, Bank of Montreal Industry Update Nov. 29, 2004, at 4, *available at* http://www.bmo.com/economic/special/beef_nov2004.pdf (noting "devastating impact" of decrease in farm cash receipts for cattle of close to $5 billion (Cdn., approximately $4 billion U.S.) between May 2003 and November 2004).

Proposed intervenors CCA/ABP represent the individuals and businesses most directly affected by this suit. CCA is the national federation of eight provincial organizations of Canadian beef producers, numbering more than 90,000. ABP, the largest member organization of CCA, represents the 28,000 Alberta producers of one half of all Canadian beef cattle.[3] The livelihood of CCA/ABP's members hinges on the outcome of this case.

B. R-CALF SEEKS TO ENJOIN THE LIMITED RE-OPENING OF THE UNITED STATES BORDER TO CERTAIN CANADIAN CATTLE AND BEEF PRODUCTS.

In May 2003, in response to the finding of a single case of BSE in Canada, USDA's Animal and Plant Health Inspection Service (APHIS) closed the United States border to all live cattle and beef products from Canada. 68 Fed. Reg. 62,386. In issuing the 2003 Rule, USDA acted under authority of the Animal Health Protection Act, 7 U.S.C. § 8301 *et seq.*, which authorizes it to prohibit or restrict the importation of animals or animal products "to prevent the introduction into or dissemination within the United States of any pest or disease of livestock." 7 U.S.C. § 8303(a)(1). USDA, through APHIS, prohibits the importation of

[3] CCA (and ABP through its CCA membership) itself submitted comments during the rulemaking process that culminated in the publication of the Final Rule, *see* AR 1116-1128, AR 5211-5213, AR 7970-7971. Furthermore, a number of individual ABP members filed comments. *See, e.g.,* AR 590-591 (R. Paskal), AR 4594 (D. Wobeser), AR 4760 (T. R. Saretsky).

certain animals from regions where BSE is known to exist or that present an undue risk of BSE. 70 Fed. Reg. at 462.

In August 2003, USDA found that certain Canadian beef products from cattle under 30 months of age posed an extremely low risk to public health and accordingly allowed the entry of such products into the United States through the issuance of import permits. *See Veneman Announces that Import Permit Applications for Certain Ruminant Products from Canada will be Accepted,* USDA News Release No. 0281.03 (Aug. 8, 2003), *available at* http:www.usda.gov/documents/NewsReleases/2003/08/0281.doc (finding an "extremely low" risk to public health in importation of certain ruminant products, such as boneless bovine meat from cattle under 30 months of age). On November 4, 2003, USDA commenced rulemaking to allow the general importation of live ruminants and specified ruminant products from Canada into the United States. 68 Fed. Reg. 62,386. During the rulemaking, USDA began to allow the importation of Canadian beef products from cattle over 30 months old. Immediately thereafter, on April 22, 2004, R-CALF sued to enjoin the issuance of import permits for these additional products. *R-CALF v. USDA*, No. 04-CV-51 (D. Mont. 2004) (*R-CALF I*). ER 1-14. USDA did not oppose the temporary restraining order requested by R-CALF, and entered into a stipulated preliminary injunction only two weeks after

the complaint was filed, restricting the issuance of import permits to only those categories of beef products that had been announced in August 2003. ER 15-19.

After an exhaustive notice and comment rulemaking proceeding lasting nearly 18 months, USDA issued a Final Rule on January 4, 2005, that determined that procedures adopted by the Canadian government and Canadian cattle producers assured the safety of certain Canadian cattle and beef.[4] The Final Rule was scheduled to go into effect on March 7, 2005. On January 10, 2005, R-CALF filed this action seeking a declaration that the Final Rule was unlawful and an injunction of the scheduled implementation of the Final Rule.

Subsequent to the filing of this lawsuit, USDA abruptly delayed indefinitely the portion of the Final Rule that permitted the importation of beef products from Canadian cattle over 30 months of age. *See Statement by Agriculture Secretary Mike Johanns,* USDA Statement Release No. 0047.05 (Feb 9, 2005), *available at* http:www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1RD?printable=true&contentid

[4] The rulemaking included consideration of more than three thousand comments, as well as extensive risk and economic analyses, 70 Fed. Reg. at 465. When a cow in Washington State (of Canadian origin) was discovered to have BSE, USDA/APHIS reopened and extended the comment period on the rule. The comment period, initially scheduled to close on January 5, 2004, was extended until April 7, 2004. *Id.* at 460. After another almost eight months of further consideration, including the updating of the risk and economic analyses, the Final Rule was published by USDA/APHIS on January 5, 2005.

only=true&contentid=2005/02/0047.xml (effective date for imports of meat from Canadian animals 30 months and over delayed); *see also* "Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities; Partial Delay of Applicability," 70 Fed. Reg. 12,112 (Mar. 11, 2005) (publishing action taken on February 9, 2005). On March 2, 2005, the court granted R-CALF's motion for a preliminary injunction.

Pursuant to a briefing schedule set by the district court, R-CALF's motion for summary judgment was filed on May 9, 2005; USDA's opposition and cross-motion for summary judgment was filed on June 10, 2005. The district court has scheduled a hearing on the merits of the dispositive motions on July 27, 2005. CCA/ABP requested an expedited briefing and hearing schedule in the instant appeal so that, if the appeal is successful, CCA/ABP might participate in the July 27 hearing, subsequent district court proceedings, and any appeal therefrom. This Court granted the motion to expedite on June 14, 2005.

C. THE DISTRICT COURT HAS RESTRICTED PARTICIPATION IN SUPPORT OF USDA'S FINAL RULE.

Prior to the filing of this appeal, the district court refused to permit participation in this case by any interested person, whether as intervenor or as *amicus curiae*, in support of implementation of USDA's Final Rule. The district court did permit, however, participation of *amici* on the side of R-CALF.

Early in the case, both the CCA and the Government of Canada were denied leave to appear as *amici*. On February 22, 2005, the CCA moved for leave to file an *amicus curiae* brief addressing R-CALF's allegations of the irreparable harm that would be caused by implementation of USDA's new rule, an element necessary to establish R-CALF's entitlement to a preliminary injunction. Specifically, the CCA sought to provide the district court accurate information to aid in evaluating R-CALF's claim that it would be substantially and irreversibly harmed by "'a flood of cheap cattle and meat from Canada,'" CCA's Motion for Leave to File *Amicus* Brief at 2-3 (quoting R-CALF's Preliminary Injunction Memo. at 36), and to refute R-CALF's claims "concerning domestic consumer and foreign market reactions to the discovery of limited cases of BSE in Canada and the U.S." *Id.* at 3. On February 23, 2005, the district court denied the CCA leave to appear as *amicus curiae,* ER 63-65, and in so doing mischaracterized the CCA's request as limited to "the economic impact in Canada of continued limits on imports from Canada," ER 63. To the contrary, the CCA's proposed brief did not address the economic impact in Canada at all.

On February 22, 2005, the Government of Canada sought to file an *amicus curiae* brief "to ensure that this Court will have an accurate understanding of the comprehensive mitigation measures Canada has implemented to ensure the safety of its beef products." Gov. Canada Mot. 1. On February 23, 2005, the district

court denied the Government of Canada's request, stating that "[i]t would be extremely prejudicial to Plaintiffs to allow the filing of a 29-page brief by the Government of Canada and only allow Plaintiff three days to respond, in addition to anticipated lengthy briefs by the USDA and NMA." ER 60.[5]

The district court has also uniformly denied motions to intervene in support of implementation of the Final Rule. On February 1, 2005, NMA moved to intervene as a defendant. NMA represents over 500 meat packers and processors, equipment manufacturers, and suppliers throughout the United States. On February 24, 2005, the district court denied NMA's motion to intervene. ER 66-71. NMA's appeal of the denial is pending before this Court.[6]

The CCA and ABP suffered the same fate when they jointly moved on March 18, 2005 to intervene pursuant to Federal Rules of Civil Procedure 24(a) and (b), urging that they had "substantial interests in the outcome of this case, and no other party to the proceeding can adequately represent those interests." Mot. to Intervene 1. Although the motion was briefed on an expedited schedule, it was not

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[5] The district court's stated concern about R-CALF's ability to respond to briefs by both USDA and NMA is baffling given its denial the very next day of NMA's motion to intervene in the matter.

[6] NMA initially sought to intervene both as defendant and as cross plaintiff. *See* NMA Mot. to Intervene (Feb. 1, 2005). After USDA's decision to delay the effective date of the Final Rule as it pertained to meat products from cattle 30 months of age and older, NMA indicated that it sought intervention only as defendant. Supplement to Motion to Intervene (Feb. 10, 2005).

until May 17, 2005, that the district court ruled on — and denied — the motion. ER 93-100.

On the side of R-CALF, the district court granted leave to appear as *amicus curiae* to the only parties that sought it. On February 16, 2005, the State Attorneys General of Connecticut, Montana, New Mexico, North Dakota, Nevada, South Dakota, and West Virginia requested leave to file an *amicus curiae* brief in support of R-CALF's motion for a preliminary injunction. The motion was unopposed. The motion was granted on February 18, 2005. ER 57-58.

On June 10, 2005, the CCA and ABP separately requested leave to file briefs *amici curiae* in opposition to R-CALF's motion for summary judgment, in order to address certain limited issues. ABP's proposed *amicus* brief addressed only the issue of R-CALF's attempt to extend the proposed import ban to certain beef products. The CCA's proposed *amicus* brief addressed only R-CALF's misinterpretation of BSE international standards and its faulty analogies between the BSE experience in North America and that of certain other countries. R-CALF did not respond to the CCA and ABP *amicus* motions, and USDA did not oppose them. The CCA and ABP motions were granted on June 15, 2005. ER 110-113. Despite the district court's leave to file the two limited *amicus* briefs, the denial of intervenor status to CCA/ABP precludes them from addressing a multitude of significant issues raised by R-CALF's summary judgment motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

CCA/ABP are entitled to intervene as of right under Fed. R. Civ. P. 24(a). Members of CCA/ABP have the most to lose by an injunction of the Final Rule. CCA/ABP have protectable interests in the North American cattle market. CCA/ABP need the market to operate free of unsound, outdated, or economically-influenced health standards; their members entered into contracts in reliance on the expected implementation of the Final Rule and rely upon its implementation for future contracting; and CCA/ABP need to protect the reputation of Canadian beef products. USDA has not, and could not, commit to protecting all of these interests. Experience has shown that CCA/ABP cannot count on USDA to represent their interests adequately. Indeed, USDA has capitulated to demands of R-CALF that are diametrically opposed to CCA/ABP's interests.

With respect to CCA/ABP's request for permissive intervention under Fed. R. Civ. P. 24(b)(2), the district court abused its discretion in denying CCA/ABP's request. There are independent grounds for jurisdiction in that CCA/ABP could have sued to determine the validity of USDA's Final Rule. Moreover, CCA/ABP's claim that the Final Rule is valid and enforceable arises out of the same questions of law and fact found in the suit by R-CALF.

STANDARD OF REVIEW

The district court's denial of intervention of right is reviewed *de novo*. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 918 (9th Cir. 2004). The denial of permissive intervention is reviewed for abuse of discretion, *see Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002), except where the decision turns on a legal question, the determination of which is reviewed *de novo*. *See San Jose Mercury News, Inc. v. U.S. Dist. Ct.—N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). The district court's determination whether an application to intervene is timely is reviewed for abuse of discretion, *see United States v. Alisal Water Corp.*, 370 F.3d at 918-919, except if the district court made no findings of fact regarding timeliness, in which case review of the issue is *de novo*. *See League of United Latin Am. Citizens v. Wilson,* 131 F.3d 1297, 1302 (9th Cir. 1997). The district court here made no findings regarding timeliness.

ARGUMENT

CCA/ABP ARE ENTITLED TO INTERVENE TO PROTECT THEIR SUBSTANTIAL INTERESTS IN THIS CASE.

A. CCA/ABP HAVE THE RIGHT TO INTERVENE.

The district court incorrectly held that CCA/ABP do not have the right to intervene under Fed. R. Civ. P. 24(a).[7] This Court has determined that a party has a right to intervene under Rule 24(a) if an applicant has shown that:

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[7] In relevant part, Fed. R. Civ. P. 24(a) provides:

> (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

United States v. Los Angeles, 288 F.3d at 397. "Rule 24 traditionally receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir.), *cert. denied*, 540 U.S. 1017 (2003). Interpretation is "guided primarily by practical considerations, not technical distinctions." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (internal quotation marks omitted). The district court failed to adhere to this "liberal" and "practical" standard.

1. CCA/ABP Have Significant Protectable Interests In The Subject Of This Action.

A significant protectable interest is demonstrated by (1) an assertion of an interest that is protected under some law, and (2) the presence of a relationship between the legally protectable interest and the plaintiff's claims. *See Los Angeles*, 288 F.3d at 398. "The relationship requirement is met if the resolution of the

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> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

plaintiff's claims actually will affect the applicant." *Id.* (internal quotation marks omitted). Both direct and indirect economic interests justify intervention as of right. *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-135 (1967) (intervention as of right of distributor in antitrust suit affecting its sole supplier and supplier's ability to perform in the future).

The members of CCA/ABP possess interests in (1) a North American beef market that is unrestricted by trade barriers based on scientifically unsound or outdated health and safety standards; (2) contracts for the sale of cattle to U.S. buyers made in reliance on the border opening on March 7, 2005 and present and future contracts for the sale of cattle affected by the continued closure of the border; and (3) the reputation of Canadian beef. Together and separately these represent significant protectable interests in the subject of this action.

CCA/ABP's legal interest in trade based upon sound health and safety standards is established by national law and international agreements. The international obligations and domestic statutes of the United States require that USDA/APHIS impose standards that are based on sound science and that are no more restrictive in scope or duration than is necessary. The North American Free Trade Agreement (NAFTA), for example, expressly requires that the United States maintain or apply sanitary measures such as the 2003 Rule and the Final Rule "only to the extent necessary" to achieve an "appropriate level of protection," and

that such measures be "based on scientific principles" and "risk assessment"; they cannot be continued "where there is no longer a scientific basis" for the measures. Article 712(5), 712(3), NAFTA, Dec. 17, 1992, 32 I.L.M. 289 (1993). Furthermore, the United States may not maintain or apply sanitary measures that discriminate between like U.S. beef cattle and Canadian beef cattle. *See id.* at Article 712(4). Similarly, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), to which the United States agreed in 1994 as part of its World Trade Organization obligations, requires that U.S. sanitary measures be applied "only to the extent necessary to protect human, animal, or plant life or health" and "not [be] maintained without sufficient scientific evidence." Article 2.2, SPS Agreement, Apr. 15, 1994, 1867 UNTS 493. Furthermore, the United States may not apply its sanitary measures "in a manner which would constitute a disguised restriction on international trade." *Id.* at Article 2.3. These international obligations, approved by Congress under the implementing legislation of both NAFTA and the Uruguay Round Agreements, are fully consistent with domestic laws. When Congress enacted the Animal Health Protection Act in 2002, pursuant to which USDA/APHIS promulgated the Final Rule, Congress specifically found that the new law was necessary "to prevent and eliminate burdens on interstate commerce and foreign commerce." 7 U.S.C. § 8301(5)(B)(i).

In reliance on its protectable interest in a beef market unburdened by unscientific health standards, CCA/APB have invested substantially in efforts to facilitate an integrated North American beef market through the development of uniform scientific standards that appropriately address the manageable risks posed by BSE. Until the 2003 border closing, the U.S. and Canadian cattle markets were highly integrated. Cattle routinely crossed the border in both directions and in large numbers. Because of CCA/ABP's substantial interest in the outcome of USDA's rulemaking, CCA (and ABP through its CCA membership) submitted comments at all stages of the rulemaking process. *Cf. Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526 (9th Cir.1983) (intervention as of right where movant "participated actively in the administrative process surrounding" challenged action). CCA/ABP's protectable interest in a market founded upon scientifically sound health standards is plainly at stake in R-CALF's challenge to the Final Rule.

A second significant protectable interest of CCA/ABP is contractual. Following the publication of the Final Rule on January 4, 2005, and in anticipation of its implementation on March 7, 2005, many Canadian cattle producers entered into contracts with U.S. buyers for the sale of Canadian beef cattle whose importation would be permitted under the Final Rule. As detailed in declarations of ABP members that were submitted to the district court, the preliminary injunction precluded the fulfillment of these contractual obligations. Cattle that

had been prepared for sale to the U.S. market to meet the requirements of the Final Rule must now be resold at lower prices in Canada, or cannot be resold at all. New contracts will be made subject to the lower prices caused by the injunction and will bind the parties, even if the injunction were reversed.[8] The preliminary injunction has already damaged the contractual relations between CCA/ABP members and their U.S. customers and has called into question the ability of these members to perform under any future contractual supply arrangements. A permanent injunction would cut off the trans-border relationships for the indefinite future, increasing the damage to CCA/ABP's members.

For purposes of intervention as of right, "[c]ontract rights are traditionally protectable interests," as this Court has recognized time and again. *Southwest Ctr.*, 268 F.3d at 820; *see also Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995) (intervention as of right for parties possessing contracts and other legally cognizable interests). A city had a right to intervene in a suit to compel the EPA to change the terms of permits the EPA issued under the Clean Water Act regulating the discharge from the city's wastewater treatment

[8] Since the border closure in 2003, prices of fed steers in Alberta have declined from approximately $107/cwt (Cdn) the week prior to the border closure in May 2003 to approximately $79/cwt in mid-March 2005, a decline of over 20 percent. Likewise, in the feeder market, prices declined by 23 percent for 550 pound steers, from approximately $144/cwt (Cdn) to $111/cwt (Cdn) in the same time period, while prices for 850 pound steers in Alberta dropped approximately 23 percent, from $110/cwt (Cdn) to $85/cwt (Cdn). *See* CanFax Weekly Reports for May 16, 2003 and March 11, 2005.

plants. *Sierra Club v. US EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993). Intervention was appropriate because "the lawsuit would affect the use of real property owned by the intervenor by requiring the defendant to change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property." *Id.* at 1483. Similarly, in a suit brought against governmental departments and officials alleging non-compliance with the Endangered Species Act, a construction company had a right to intervene. *Southwest Ctr.*, 268 F.3d at 820. The company had "a substantial interest as a third-party beneficiary of the assurances and approval process set out" in the agreement that was threatened by the suit. *Id.* A state and county had a right to intervene where they had "legally cognizable interests in the property that was subject to the injunction." *Forest Conservation Council*, 66 F.3d at 1495. The suit involved an action against the U.S. Forest Service for non-compliance with federal mandates that would affect forest management and other activities conducted on the subject land and tax revenues collected by intervenors.[9] The contractual interests of CCA/ABP that are jeopardized by the R-CALF lawsuit are at least as direct and substantial as those of the intervenors in these other cases.

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[9] *See also, e.g., Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 968, 973 (3d Cir. 1998) (intervention as of right for lumber company that would be party to contract threatened by litigation); *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (intervention as of right for timber purchasing companies with contracts threatened by suit).

A third significant protectable interest of CCA/ABP is reputational. The marketability of beef cattle and beef products of Canadian cattle producers is entirely dependent on the reputation of those products for quality and safety. In effect, R-CALF seeks a judicial declaration that Canadian beef is unsafe. Such a declaration would have a devastating impact on the reputation of Canadian beef cattle and beef products not only in the United States but in Canada and throughout the world. A final determination by the district court that Canadian procedures to prevent the spread of BSE are inadequate would stand as an indictment of the Canadian cattle industry. Because CCA/ABP have a legally protected interest in the reputation of their products in the marketplace and a corollary interest in the integrity of the Canadian BSE control system, CCA/ABP incontestably have a stake in the Final Rule that R-CALF is calling into question. *See Los Angeles*, 288 F.3d at 399 (police officers' protectable interest in adjudication of allegations that they committed unconstitutional acts in the line of duty in suit against city).

The district court erroneously held that CCA/ABP have no legally protectable interest in this case, remarking that they "have no unique interest in having an unrestricted beef market because everyone who trades in beef in Canada and the United States shares this interest" and that their contracts and their reputation are "collateral" interests insufficient to justify intervention as of right. ER 95-96. By any measure, CCA/ABP's interest in an unrestricted beef market is

"unique": this action was filed precisely to stop CCA/ABP members from exporting their cattle and beef products to the United States. No other party can claim the same direct interest in the subject of the litigation. Further, the district court was mistaken to dismiss as "collateral" CCA/ABP's contractual or reputational interests. The interests of proposed intervenors need not be protected under the statute under which the lawsuit is brought. *See Sierra Club*, 995 F.2d at 1484 (intervenors' "interest was protected by a statute other than the one put at issue by the complaint"); *see also, e.g., Sagebrush Rebellion*, 713 F.2d at 528 (rejecting proposition that "the intervenor's interest . . . [is] measured in relation to the particular issue before the court at the time of the motion and not in relation 'to the subject of the action,' as provided in Rule 24.").

The cases cited by the district court in support of its finding are inapplicable. ER 95-96. In one, the United States brought an environmental action against municipal water systems and their owners and operators, and intervention as of right was denied because the proposed intervenor's sole interest in the suit was the "prospective collectability of the debt" owed by the defendant to the proposed intervenor. *Alisal Water Corp.*, 370 F.3d at 920. "To hold otherwise," the Court remarked, "would create an open invitation for virtually any creditor of a defendant to intervene in a lawsuit where damages might be awarded." *Id.* The interests that CCA/ABP possess in the closure of the United States border to their members'

cattle and beef products are far more direct and substantial than the derivative interest that a creditor has in any potential financial liability. The other case cited by the district court denied intervention to an Indian tribe in an action between a second tribe and the Department of the Interior. *See Greene v. United States*, 996 F.2d 973 (9th Cir. 1993). The proposed intervenor's fishing rights were found to be outside the scope of the suit brought by the second tribe, as that suit was for federal recognition; indeed, the issue of fishing rights was barred by the district court from consideration in further proceedings before an administrative law judge. *Id.* at 976-978. In contrast, CCA/ABP have a substantial protectable interest in the very core of the instant case: whether the United States market will be closed to their members' cattle and beef products.[10]

2. Disposition Of This Action May Impair CCA/ABP's Ability To Protect Their Interests.

The second requirement for intervention as of right is that the disposition of the case "may" impair the ability of the intervenor to protect its interests. *Los Angeles*, 288 F.3d at 397. "[I]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Southwest Ctr.*, 268 F.3d at 822 (citing advisory committee note to Fed. R. Civ. P. 24).

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[10] The district court also cites "Order of February 15, 2005 at 3," in support of its finding, but the district court's docket sheet lists no such order.

The disposition of R-CALF's claims may directly impair CCA/ABP's ability to protect their interests in trade policy based on sound health and safety standards, in contractual relationships, and in the reputation of Canadian beef. As emphasized above, these interests are the "subject of the litigation," Fed. R. Civ. P. 24(a) and will be adjudicated by this suit. CCA/ABP's members' livelihood hinges on the outcome. Therefore, the district court's decision whether USDA's Final Rule will be implemented may have a direct and substantial impact on the interests of CCA/ABP members.

In denying intervention as of right, the district court offered no analysis of this second criterion, commenting only that "[a]s stated above, CCA and ABP have failed to articulate a significant interest in these proceedings[; t]hus, this factor also weighs toward the denial of CCA and ABP's motion." ER 96.

3. The Existing Parties May Not Adequately Represent CCA/ABP's Interests.

The third requirement for intervention as of right is met by an intervenor whose interests the existing parties "may" not adequately represent. *Los Angeles*, 288 F.3d at 397. The applicant's burden is "minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), and "is satisfied if the applicant shows that representation of [its] interest 'may be' inadequate." *Id.* In assessing adequacy of representation, this Court considers

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki, 324 F.3d at 1086.

CCA/ABP have plainly carried their "minimal" burden in this regard. R-CALF surely may not adequately represent CCA/ABP's interests, and the district court made no suggestion that it could. As for USDA, none of the three criteria for assessing adequacy of representation supports the district court's conclusion that USDA can serve as CCA/ABP's proxy. Under the first criterion, "whether the interest of [USDA] is such that it will undoubtedly make all of [CCA/ABP's] arguments," USDA's interests are not so aligned with those of CCA/ABP as to ensure that USDA will make all of CCA/ABP's arguments. As a governmental body, USDA is not presumed to represent the interests of entities such as CCA/ABP, which are not its constituents. *See Los Angeles*, 288 F.3d at 401-402 (intervention as of right for Police League, which was not a constituent of defendant City of Los Angeles). It is particularly implausible that USDA would "undoubtedly" make "all" of CCA/ABP's arguments given that CCA/ABP are foreign persons. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (holding inadequate the representation by U.S. government of Mongolian intervenor's interest in Mongolia's people and natural resources).

More generally, governmental entities may not adequately represent the particular interests of private parties where the government is mandated to represent the general interests of its citizens. *Compare Southwest Ctr.*, 268 F.3d at 823 (inadequate representation where "the City's range of considerations in development is broader than the profit-motives animating [intervening] developers") *and Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (inadequate representation where intervenor's interests "were potentially more narrow and parochial than the interests of the public at large"); *and Forest Conservation Council*, 66 F.3d at 1499 (inadequate representation where Forest Service must represent "the broad public interest" and not just "the more narrow, parochial interests of the [proposed intervenors]"); *with Arakaki*, 324 F.3d at 1087 (adequate representation where government had "specific statutory and constitutional obligations" to protect the rights of proposed intervenors).[11] Similarly, USDA could not adequately represent

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[11] In granting intervention as of right, one magistrate judge explicitly addressed USDA's ability to represent private interests adequately:

> [M]erely because parties share a general interest in the legality of a program or regulation does not mean their particular interests coincide so that representation by the agency alone is justified. In defending the [USDA program], the USDA and APHIS represent a broad spectrum of interests, which includes the general public . . . . The intervenors, by contrast, have [ ] more narrow interests and concerns . . . . Therefore, while the USDA may have a general interest in defending the [program] at issue, its obligations to interests other than

the particular interests, contractual and otherwise, of CCA/ABP members in the re-opening of the U.S. border.

Under the second criterion of adequacy of representation, "whether [USDA] is capable and willing to make all [of CCA/ABP's] arguments," USDA again is found lacking. For purposes of this criterion, this Court has held that "[i]t is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants." *Southwest Ctr.*, 268 F.3d at 824.

The difference in the interests of USDA and CCA/ABP is strikingly apparent. Indeed, USDA has never asserted that it is willing to represent all of CCA/ABP's interests. This is not surprising, considering that USDA is not authorized to represent the interests of foreign associations whose members produce the specific products the agency is charged with regulating. Neither could nor would USDA always act to protect the reputation of Canadian cattle and beef.

Recent actions by USDA confirm that its interests diverge from those of CCA/ABP. Before this suit was filed, R-CALF sued USDA in *R-CALF I* for an injunction to prevent the expansion of the post-August 2003 permitting process

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> those represented by the [proposed intervenors] may necessarily render its representation of the [proposed intervenors] inadequate.

Am. Horse Prot. Ass'n, Inc. v. Veneman, 200 F.R.D. 153, 159 (D.D.C. 2001) (internal citations omitted).

that had authorized individual companies to import certain Canadian bovine meat products. ER 1-14. USDA did not oppose R-CALF's request for a temporary restraining order and entered into a stipulated preliminary injunction only two weeks after the complaint was filed. ER 15-19. USDA plainly did not adequately represent CCA/ABP's interests in the expanded permit opportunities that would have enabled CCA/ABP members to sell more products to the U.S. market.

Only a few months ago, USDA capitulated a second time. The Final Rule, as first published on January 4, 2005, allowed the importation of certain products from cattle over 30 months old. Without soliciting further public comment and likely in violation of the Administrative Procedure Act (APA), USDA unilaterally delayed this aspect of the Final Rule after the R-CALF lawsuit was filed. 70 Fed. Reg. 12,112 (Mar. 11, 2005). USDA's decision was highly injurious to CCA/ABP and in contravention of the scientific study and risk analyses conducted by USDA. It could well be this action by USDA is violative of U.S. obligations under NAFTA and the SPS Agreement. While CCA/ABP thus far have elected not to challenge that USDA action in this case, these serious differences in interests demonstrate that USDA may not adequately represent CCA/ABP in this case.

Against this background, it is not difficult to foresee disagreements between CCA/ABP and USDA on a wide range of matters that may arise in resolving this dispute, including the need for further delays of importation, further restrictions on

the cattle or beef eligible for importation or transshipment, or limits on cattle volumes. *Cf. Brennan v. N.Y. Bd. of Educ.*, 260 F.3d 123, 132-133 (2d Cir. 2001) (inadequate representation where defendant "may have an equally strong or stronger interest in bringing such litigation to an end by settlements involving the displacement of [potential intervenors] who are not parties to the action.").

Under a third criterion for determining adequacy of representation, "whether [CCA/ABP] would offer any necessary elements to the proceeding that other parties would neglect," *Arakaki,* 324 F.3d at 1086, CCA/ABP would offer needed insights and expertise that other parties are unable to provide. For example, R-CALF has criticized the Final Rule based on the economic impact of projected cattle volumes imported from Canada, data that CCA/ABP could supply. *See, e.g., Natural Resources Defense Council v. Costle*, 561 F.2d 904, 912-913 (D.C. Cir. 1977) (intervenors' "participation in defense of EPA decisions that accord with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense").

CCA/ABP can also provide information critical to potential future aspects of this case. In addition to seeking an injunction against implementing the Final Rule, R-CALF's motion for summary judgment claims that USDA should not be allowed to continue operation of the permit process by which certain types of Canadian beef have been allowed to enter the United States both before the promulgation of

the Final Rule and since its injunction. *See* R-CALF Mem. Supp. Summ. J. at 28-29.[12] The harm to CCA/ABP members would be direct, immediate, and devastating if the district court were to grant R-CALF's request to enjoin imports of beef products that have been permitted to enter the United States since August 2003, and have done so, it should be noted, with R-CALF's consent. *See R-CALF I* Stipulation. Indeed, CCA/ABP would seek a stay of the district court's order to enable the currently permitted importation to continue until an appeal on the merits could be considered by this Court. No party other than CCA/ABP would be in the position to prove the harm to CCA/ABP's interests if the importation of beef by permit were enjoined. Even if USDA sought a stay, USDA would not be the best advocate for Canadian interests, which it does not have a duty to represent. CCA/ABP should be permitted to intervene where their interests could be so severely impaired. *See Fund for Animals*, 322 F.3d at 735 (Mongolian agency permitted to intervene where reestablishing status quo if plaintiff succeeds "will be difficult and burdensome" and the intervenor's "loss of revenues during any interim period would be substantial and likely irreparable.").

[12] ABP submitted an *amicus curiae* brief to the district court on June 10, 2005 detailing the many reasons why R-CALF's request for injunction of the permitting process is not appropriately before the district court.

The district court justified its finding that USDA adequately represented CCA/ABP by stating that (1) USDA is in a better position to defend the Final Rule, (2) CCA/ABP's "final objective" in this suit is the same as USDA's, and (3) any differences between them amount to nothing more than "quibbles over litigation tactics." ER 97-98. These conclusions fail on their merits and ignore the precedents of this Court.

First, intervention as of right is available in actions challenging agency rules no less than in other actions. *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1397-1399 (9th Cir. 1995) (intervention as of right in challenge to final rule listing endangered species). Since judicial review of administrative action is not necessarily restricted to the administrative record, evidence outside the record provided by intervenors such as CCA/ABP can be used for "background information" or for the purposes of "ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("it is both unrealistic and unwise to 'straightjacket' the reviewing court with the administrative record"). Indeed, the district court has engaged in extensive review of materials outside the administrative record, relying on R-CALF's voluminous submissions of materials and declarations in granting R-CALF's motion for a preliminary injunction. *See, e.g., Ranchers Cattlemen Action Legal Fund v.*

USDA, 359 F.Supp. 2d at 1061 (referencing Declaration of Dr. John VanSickle, submitted by R-CALF, for "background" that fears of contracting fatal illness from consumption of U.S. beef closed certain foreign markets to U.S. products); *id.* at 1066 (relying on Declaration of Dr. Louis Anthony Cox, also submitted by R-CALF, regarding credibility of USDA risk assessment).

Second, even if USDA and CCA/ABP were to share the same "ultimate objective," any presumption of adequate representation is rebutted where, as here, the two parties do not have "sufficiently congruent interests." *Southwest Ctr.*, 268 F.3d at 823 (noting that "a federal agency, and other defendants . . . cannot be expected under the circumstances presented to protect these private interests").

Third and finally, conflicting interests between USDA and CCA/ABP rise far above "quibbles over litigation tactics." The district court's authority for this statement undermines, rather than supports, its conclusion. *See Jones v. Prince George's County, Md.*, 348 F.3d 1014, 1019-1020 (D.C. Cir. 2003) (adequate representation where interests were "perfectly congruent" and disagreement between parties focused solely on "a series of strategic blunders" such as filing suit in an improper forum); 7C Charles Alan Wright, *et al.*, *Federal Practice & Procedure: Civil* § 1909 at 346 (2d ed. 1986) (noting "interests need not be wholly adverse before there is a basis for concluding that existing representation of a different interest may be inadequate" and "since the rule is satisfied if there is a

serious possibility that the representation may be inadequate, all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that he may be heard in his own behalf") (internal quotation marks omitted).

4. CCA/ABP's Motion To Intervene Was Timely.

In determining whether an applicant's request to intervene is timely filed, the Court considers (1) the stage of the proceeding at which the applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of any delay. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir.1984) (intervention permitted in new stage of proceedings where possibility existed for expanded negotiations); *see also Cummings v. United States*, 704 F.2d 437, 440-441 (9th Cir. 1983) (timeliness found at the end of discovery). Timeliness may be found when a motion is filed at a new stage of the proceeding or when circumstances in the litigation have changed. *See United States v. Oregon*, 745 F.2d at 552 (timeliness found at the remedial and appellate phases of the case after trial); *Januszíewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 293 (3d Cir. 1982) (timeliness found for participation in a new phase of litigation).

Here, the CCA/ABP motion to intervene was filed immediately upon the district court's entry of a briefing schedule for dispositive motions, and months before those motions were due to be filed. CCA/ABP expressly agreed to abide by

the briefing schedule. Neither R-CALF nor USDA asserted that the motion to intervene was untimely,[13] nor did the district court cite untimeliness in its denial of the motion. Thus, the timeliness of CCA/ABP's motion to intervene is not at issue.

B. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS PERMISSIVE INTERVENTION.

The district court's denial of CCA/ABP's request for permissive intervention under Fed. R. Civ. P. 24(b)(2) was an abuse of discretion.[14] Permissive intervention may be granted upon a showing that: "(1) independent grounds for jurisdiction exist; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Los Angeles*, 288 F.3d at 403. CCA/ABP met all of these criteria.

First, independent grounds for jurisdiction exist under the APA for CCA/ABP to request a declaratory judgment to determine the validity of USDA's Final Rule. 5 U.S.C. § 702. *See Nat. Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488-89 (1998) ("[W]hen a plaintiff's interest is arguably

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[13] In its Opposition, USDA specifically stated that it was "not challenging the timeliness of Proposed Intervenors' Action." USDA Opposition at 5 n.l.

[14] In relevant part, Fed. R. Civ. P. 24(b)(2) provides:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

within the zone of interests to be protected by a statute . . . we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff.") (internal quotation marks omitted). Second, as explained above, the timeliness of CCA/ABP's motion to intervene is uncontested. Third, CCA/ABP's claim that the Final Rule is valid and enforceable arises out of the same questions of law and fact implicated by R-CALF's challenge to the Final Rule.

The district court denied CCA/ABP's request for permissive intervention based on other considerations, which it stated that it could consider in its discretion: that "USDA can adequately represent the concerns of CCA and ABP . . . [and t]he proposed intervenors cannot make a significant contribution to the development of factual issues because the administrative record contains all of the information on which the APA claims in this case will be decided." ER 99. As discussed above, USDA is unable to represent adequately the interests of CCA/ABP, and, in actions challenging the validity of an administrative action, the court's consideration is not confined to what may be contained within the agency's administrative record but can include supplemental evidence providing background information or assisting in evaluating factors considered by the agency. Accordingly, the district court abused its discretion in denying CCA/ABP permissive intervention.

CONCLUSION

The district court's order denying CCA/ABP's motion to intervene should be reversed and remanded with instructions to grant CCA/ABP's motion to intervene.

DATED: June 17, 2005.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the Canadian Cattlemen's Association and Alberta Beef Producers are aware of the following related cases. *See* Ninth Circuit Rule 28–2.6:

No. 05-35264: U. S. Department of Agriculture's appeal from the granting of the preliminary injunction in this case;

No. 05-35214: National Meat Association's appeal from the denial of its motion to intervene and appeal from the granting of the preliminary injunction.

The Court has consolidated oral argument on the instant case with the two related cases.

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CERTIFICATE OF COMPLIANCE with rule 32(A)
AND NINTH CIRCUIT RULE 32–1

Certificate of Compliance With Type-Volume Limitations,
Typeface Requirements, and Type Style Requirements

1. This opening brief of Proposed Intervenors-Appellants Canadian Cattlemen's Association and Alberta Beef Producers complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8721 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This opening brief of Proposed Intervenors-Appellants Canadian Cattlemen's Association and Alberta Beef Producers complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2002 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of June, 2005, I filed the original and copies of the foregoing brief and Excerpts of Record with the Clerk of the Court by third-party commercial carrier for delivery within 3 calendar days, and I served two copies of the foregoing brief and Excerpts of Record by third-party commercial carrier for delivery within 3 calendar days and electronic mail on the parties herein, at the following addresses:

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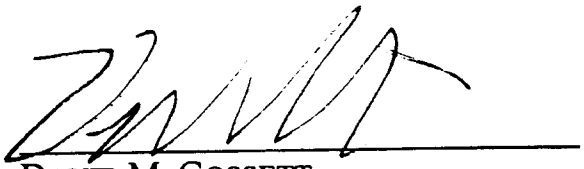

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